

65728-3

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No. 65728-3

COURT OF APPEALS - DIVISION ONE
IN AND FOR THE STATE OF WASHINGTON

R&R CONCRETE, INC

Appellants/Cross Respondent,

v.

MICHAEL AND MARILEE COAKER ET AL,

Respondents/Cross Appellant.

APPEALED FROM KING COUNTY SUPERIOR COURT
THE HONORABLE CAROL SCHAPIRA

APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS
APPELLANT'S BRIEF

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COURT OF APPEALS
DIVISION ONE
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I. INTRODUCTION

The trial court properly ruled that R&R substantially demonstrated that it was a valid contractor. The evidence and allegations of Cross-Appellant show that all reasonable assumptions prove that R&R Concrete, Inc. was a valid contractor able to maintain a claim against Cross-Appellant. The trial court improperly ruled, however, that the undisclosed expert witness was permitted to testify.

II. LAW AND ARGUMENT

1. **The trial court properly found that that R&R Concrete, Inc. was a valid contractor pursuant to RCW 18.27.080.**

The Coakers do not allege now nor did it in trial that R&R was not a registered contractor. Instead, Coakers' sole claim is that there was insufficient proof of registration. The evidence contradicts this assertion. *First*, the contract entered into between the parties identifies R&R's contractor registration number (RRCONI*033DR) in the letterhead. CP78-83. *Second*, the Coakers filed a counterclaim seeking recovery against R&R's contractor's bond. CP 10-14. The Coakers' claim presumes that

they were aware of R&R's valid contractor status as a prerequisite to seeking recovery under its accompanying bond.

The trial court properly ruled that there was substantial evidence of R&R's compliance with the statute sufficient to prosecute its claims. Washington courts have generally addressed whether there is substantial proof of compliance with the Contractor's Registration Act ("CRA") and not whether there was enough evidence to demonstrate whether there was in fact registration. In cases where a contractor was unregistered the courts have looked at whether the intent of the legislature was satisfied to permit the contractor to maintain his claim. An unregistered contractor may bring an action for compensation if he or she has complied substantially with the CRA; in other words, satisfied the legislative purpose of the statute. Bort v. Parker, 110 Wash. App. 561, 571, 42 P.3d 980, 986 (2002) *citing* Williamson, Inc. v. Calibre Homes, Inc., 106 Wash. App. 558, 564, 23 P.3d 1118, 1122 (2001) aff'd and remanded, 147 Wash. 2d 394, 54 P.3d 1186 (2002). "Whether there has been substantial compliance depends on the particular facts of each case." Id. at 564. The contractors' registration act encourages compliance by requiring a contractor to be registered in order to maintain an action for breach

of contract or for compensation. Id. Registration requires, among other things, evidence of a surety bond and public liability insurance. Id.

For example, the court ruled that the contractor was in substantial compliance with the contractor registration statute where he merely failed to pay a \$20 renewal fee. H.O. Meyer Drilling Co. v. Alton V. Phillips Co., 2 Wash. App. 600, 606, 468 P.2d 1008, 1011 (Wash. Ct. App. 1970) aff'd sub nom. H. O. Meyer Drilling Co. v. Alton V. Phillips Co., 79 Wash. 2d 431, 486 P.2d 1071 (1971). The court ruled that the failure to get a renewed certificate did not deprive any beneficiary of the fiscal protection of the contractor's act. Id. Since the purpose of the act was satisfied, the contractor was in substantial compliance. Id.

Similarly here, the Coakers brought a counterclaim against R&R's contractor's bond. By its own admission, the Coakers knew that R&R was properly bonded as contractor when it sought recovery from the bond. The bonding company never sought to be dismissed from the case by alleging that R&R was not a valid contractor. Had the Coakers been entitled to a judgment in its favor, the bonding company would have been forced to pay.

The Coakers cite to Stewart v. Hammond, 78 Wash. 2d 216, 218, 471 P.2d 90, 92 (1970) to support its assertion that R&R is not entitled to recovery. However, in Hammond, the contractor alleged that he was not required to be registered because funds he had received were wages exempting him from the contractor registration law. Id. at 218. No evidence was presented of his contractor registration because he was admittedly not registered.

That case is distinct from ours. In our case, the Coakers never asked R&R if he had a valid contractor's license at the relevant times. Nor did Coakers provide any evidence to prove that R&R was not a valid contractor. All evidence points to the fact that R&R was a registered contractor.

The Coakers also cite to Cameron v. State 15 Wn.App 250, 548 P.2d 555 (1976). The facts are scant on the court's finding of the contractor's failure to prove proper registration. However, the state had previously halted the contractor from working because of noncompliance. Id. at 251.

The evidence demonstrated that R&R was a valid contractor and the court did not error in finding that R&R provided such evidence.

2. The trial court erred by permitting the testimony of Mr. Deress.

The trial court should not have permitted Mr. Deress to testify and should have stricken his testimony. The evidence is clear that Mr. Deress was not identified as a witness and testified about facts beyond the scope of his subordinate's observations. His testimony was based on his own measurements and observations.

The Coakers cite to Rice v. Janovich, 109 Wn.2d 48, 742 P.2d 1230 (1987) for the proposition that R&R was aware of the testimony that would be presented and so it was immaterial who actually testified the day of trial. This assertion is inconsistent with the facts of our case. Mr. Deress testified about his own personal observations that were not disclosed until during trial. Mr. Deress had never been disclosed so this was not a situation like Rice in which the complaining party had a list of witnesses, but just did not know exactly whom would testify. Additionally, the Coakers did not provide any explanation for the late disclosure nor did the Coakers advise R & R that it was unsure who would testify at trial.

The Coakers provide no authority to support the contention that R & R must show how the late disclosure was intentionally

hidden. Without any evidence to explain the reason for the failed disclosure the only logical conclusion is that it was for improper purposes. The evidence supports an improper purpose allegation as well. Since Mr. Deress visited the Coaker residence during the first day of trial, took extensive notes, measurements, and observations, there was never an intent to have him testify until the trial had already begun. Mr. Deress did not come to testify about another person's report. He testified about his own observations.

Additionally, the Coakers do not provide any authority for the proposition that disclosure of one person from a company permits the testimony of anyone else from the same company.

The Coakers also cite to In re Estate of Foster, 55 Wn.App. 545, 779 P.2d 272 (1989). That case did correctly cite that the failure to disclose the witness was willful. The court defined a "willful" violation as a violation without a reasonable excuse. Thus, even an inadvertent error in failing to disclose an expert witness has been deemed willful, justifying exclusion of testimony. Id. at 549. The court ultimately concluded that the failed disclosure was willful because there was no reasonable excuse for the violation. Id. In our case, the Coakers did not offer any explanation for the failed disclosure. Therefore the failure was willful.

The Foster case next addresses prejudice as a requirement for justifying exclusion of an expert witness. In that asbestos case, the expert was testifying on a state of the art development in medical knowledge regarding asbestos. Id. at 549. The court ruled that attorneys practicing in asbestos litigation would be familiar with this testimony. Id. at 547. Additionally, once the late disclosure had been made, counsel was given the expert's resume, prior trial transcripts of his testimony, deposition transcripts, and a written summary of the facts and opinions and grounds for each opinion that the expert would testify on. Id. at 547-48. Additionally, the adversely effected party had only complained that it did not have an opportunity to ask the expert about his opinion of their expert witnesses.

That case is distinct from ours. Our case is not a massive asbestos litigation involving the same experts testifying about medical theories. Mr. Deress testified about his opinion on the workmanship of the work performed on the Coaker residence. His opinions were based upon his own personal observations, not on construction theory.

III. CONCLUSION

This court should find that the trial court erred by permitting the testimony of Mr. Deress and find that trial court properly found that R&R Concrete, Inc. was a valid contractor. R&R Concrete, Inc. requests that this court award attorneys' fees and costs pursuant to the contract and RAP 18.1

Respectfully submitted this 16th day of March, 2011

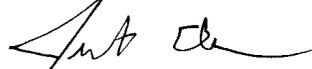
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Certificate of Service

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